

BRIAN L. DAVIDOFF State Bar No. 102654  
JAMIE L. EDMONSON, State Bar No. 185384  
RUTTER, HOBBS & DAVIDOFF INCORPORATED  
1900 Avenue of the Stars, Suite 2700  
Los Angeles, California 90067-4301  
Telephone: (310) 286-1700  
Telecopier: (310) 286-1728  
E-mail for Mr. Davidoff: bld@rhdllaw.com  
E-mail for Ms. Edmonson: jle@rhdllaw.com

Attorneys for **HOME DEPOT, U.S.A., INC.**

**FILED**

SEP - 1 1999

KEVIN E. GIBSON  
UNITED STATES  
BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF ARIZONA**

In re:	)	Case Nos. 98-12547 through
	)	98-12570-ECF-CGC
	)	Jointly Administered
BCE WEST, L.P., et al.,	)	
	)	Chapter 11
	)	
Debtors.	)	<b>HOME DEPOT'S UNILATERAL</b>
	)	<b>PRETRIAL STATEMENT; <del>ORDER</del></b>
EID: 38-3196719	)	<b><del>THEREON</del></b>
	)	
	)	Date: September 8, 1999
	)	Time: 1:30 p.m.
	)	Place: Courtroom 6
	)	2929 North Central Avenue
	)	Phoenix, Arizona 85067-4151
	)	
	)	
	)	

ORIGINAL

Home Depot USA, Inc. ("Home Depot") hereby submits the following unilateral pretrial report in connection with the hearing set in this matter for September 8, 1999 at 1:30 p.m. in Courtroom 6.

1       **I.       The following facts are admitted and require no proof:**

- 2               1.       Debtor BC Goldengate LLC holds a leasehold interest in that  
3                       nonresidential real property listed as store operating lease number  
4                       1127 (the "Lease"), which is part of the San Jose Hillsdale  
5                       Shopping Center, located at 1855 Hillsdale Avenue, San Jose,  
6                       California (hereinafter referred to as the "Property") formerly  
7                       owned by Property Development Associates ("PDA").
- 8               2.       On or about May 3, 1995, Boston Chicken, Inc. and PDA entered  
9                       into a Ground Lease for the Property.
- 10              3.       The Lease term was for the period May 3, 1995 through November  
11                      10, 2005, with three options to extend for five (5) years each.
- 12              4.       The monthly base rent under the Lease is currently \$62,500 per  
13                      year, with an automatic increase in the rent to \$71,875.00 per year  
14                      commencing on November 11, 2000.
- 15              5.       On or about July 14, 1995, BC Goldengate LLC became the tenant  
16                      of the Lease through an Assignment and Assumption of Leases  
17                      entered into between it and Boston Chicken, Inc.
- 18              6.       Prior to the closing with PDA, Home Depot offered the Debtor a  
19                      lease buyout of \$850,000 during or about April of 1999 (the  
20                      "Offer").
- 21              7.       The Debtor turned down the Offer because the Debtor would be  
22                      required to turn over the proceeds of the Offer to its creditors.
- 23              8.       The Lease with PDA was not in default on the petition date, and  
24                      there has been no default since the petition date by the Debtor.
- 25              9.       For the 1997 calendar year the gross income for the Store was  
26                      \$1,030,000.00, and the Store operating cash flow was \$76,609.00.
- 27              10.       For the 1998 calendar year, the gross income for the Store was  
28                      \$711,037.00, and the Store operating cash flow was \$55,322.00.
11.       For Accounting Period 1 through Accounting Period 7 for the 1999  
                    calendar year, the gross income for the Store was \$346,521.00, and  
                    the Store operating cash flow was \$(8,908.00).

12. The Debtor has, for its analysis (which is disputed by Home Depot), disregarded the Store operating cash flow loss of \$13,114, which occurred during Period 1 of 1999. Therefore, for the Debtor's analysis purposes (which is disputed by Home Depot), the Store operating cash flow is \$4,206 for Periods 2 through 7.

**II. The following issues of fact, and no others, remain to be litigated:**

**A. Home Depot.**

1. Whether the Lease for Store 1127 is worth less than the Offer.
2. Whether assumption of the Lease enhances the value to the Debtor's estate.
3. Whether the proposed assumption of the Lease is too speculative in face of the Offer.
4. Whether the Debtor properly exercised its business judgment in its proposed assumption of the Lease.

**B. Debtor.**

1. Whether Home Depot withdrew the alleged \$850,000 Offer to purchase the Lease.
2. Whether Home Depot has resubmitted its previous Offer at a lower price of \$500,000.
3. Whether the present circumstances of these cases justify the assumption or rejection of the Lease.

**III. The following issues of law, and no others, remain to be litigated:**

1. Whether the Debtor should be authorized to assume the Lease under 11 U.S.C. § 365.
2. Whether Home Depot has standing to raise the issues set forth in II.A. above.
3. Whether a landlord has standing to object to assumption of a non-residential real property lease if there is no default in such lease.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

- 4. Whether the issues raised by Home Depot in II.A. are relevant to a determination of whether the Lease should be assumed.
- 5. Whether the lack of objection by any creditor bars Home Depot's objection to assumption of the Lease.
- 6. Whether, in the absence of any default, the Debtor is prohibited from assumption of the Lease absent a showing that such assumption would have a material detrimental effect on the Debtor's estate.
- 7. Whether proof of enhancement of value is required to authorize assumption of the Lease is there if no default.
- 8. Whether proof of exercise of business judgment is required to authorize assumption of the Lease if there is no default.
- 9. Whether a third party, not a party in interest, can acquire an interest in property subsequent to the filing of a Chapter 11 case and thereby gain standing.

**IV. Attached is a list of exhibits intended to be offered at the trial by the Debtor and Home Depot, other than exhibits to be used for impeachment purposes. The parties have exchanged copies of all exhibits.**

**V. Attached is a list of witnesses intended to testify at trial by the Debtor and Home Depot, other than witnesses to be used for impeachment and rebuttal purposes. The parties have exchanged their witness lists.**

**VI. Other matters that might affect the trial, such as motion in limine:**

**VII. All discovery desired to be conducted has been completed, however the Debtor will make Randy Miller and Lawrence White available for deposition by Home Depot on September 2, 1999. Home Depot's only other discovery is that the Debtor disclose the overall store rankings of the Debtor, including this Lease.**

**VIII. The parties are ready for trial.**

**IX. The estimated length of trial is approximately ½ day.**

1  
2 X. The foregoing admissions have been made by the parties, and the  
3 parties have specified the foregoing issues of fact and law remaining  
4 to be litigated. Therefore, this order shall supersede the pleadings and  
5 govern the course of trial of this cause, unless modified to prevent  
6 manifest injustice.

7 DATED: August 31, 1999

RUTTER, HOBBS & DAVIDOFF  
INCORPORATED

8 By: Jamie L. Edmonson  
9 Brian L. Davidoff  
10 Jamie L. Edmonson  
11 Attorneys for Home Depot U.S.A., Inc.

12 **ORDER**

13  
14 **IT IS SO ORDERED.**

15  
16 DATED: \_\_\_\_\_

17 \_\_\_\_\_  
18 CHARLES CASE, II  
19 UNITED STATES BANKRUPTCY JUDGE  
20  
21  
22  
23  
24  
25  
26  
27  
28

**EXHIBIT LIST**

**Debtor**

1. The Debtor does not have any exhibits in addition to those listed by Home Depot.

**Home Depot**

1. May 3, 1995 Ground Lease between Boston Market, Inc. and Property Development Associates
2. July 14, 1995 Assignment and Assumption of Leases between Boston Market, Inc. and BC Goldengate LLC
3. 1997 Income Statement for Store 1127
4. 1998 Income Statement for Store 1127
5. 1999 Income Statement for Store 1127 (Accounting periods 1 through 7 only)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**WITNESS LIST**

**The Debtor**

1. Randy Miller
2. Such other rebuttal witnesses as may be required as a consequence of the testimony of Home Depot's witnesses.

**Home Depot**

1. Randy Miller
2. Lawrence White
3. Patrick McGaughey
4. Nevin Sanli of Sanli, Pastore & Hill, Inc., as valuation expert

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action; my business address is 1900 Avenue of the Stars, Suite 2700, Los Angeles, California 90067.

On August 31, 1999, I served the foregoing document described as:

**HOME DEPOT'S UNILATERAL PRE-TRIAL STATEMENT**

on the interested parties in this action by sending a true and correct copy thereof by mail by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

**(PLEASE SEE ATTACHED)**

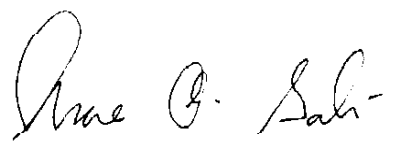
I caused such envelope to be deposited in the mail at Los Angeles, California.

I am readily familiar with this law firm's practice of collection and processing correspondence for mailing. It is deposited with the U. S. Postal Service on the same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit indicated for mailing in this affidavit.

Executed on August 31, 1999, at Los Angeles, California.

{ } I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

{xx} I declare that I am employed in the office of a member of the Bar of this Court at whose direction this service was made.



\_\_\_\_\_  
ANNE O. SALANO



**SERVICE LIST**

Daniel Hatch, Esq.  
Regional General Counsel  
Home Depot, Inc.  
3800 West Chapman Avenue  
Orange, California 92868  
Telephone: (714) 940-3500  
Facsimile: (714) 960-3632

Deirdre M. Dawson  
Cassidy, Cheatham, Simko & Dawson  
20 California Street, Suite 500  
San Francisco, Ca. 94111  
Telephone: (415) 788-2040  
Facsimile: (415) 788-2039

**Attorneys for Official Committee  
of Unsecured Creditors:**

Christopher H. Bayler  
Snell & Wilmer, LLP  
One Arizona Center  
400 E. Van Buren  
Phoenix, Arizona 85004-0001  
Tel: (602) 382-6214  
Fax: (602) 382-6070

**Attorneys for GECC:**

Jean B. LeBlanc  
Murphy, Sheneman, Julian & Roberts  
2049 Century Park East, Suite 2100  
Los Angeles, Ca 90067  
Tel: (310) 788-3700  
Fax: (310) 788-3777

1  
2 **PROOF OF SERVICE VIA FEDERAL EXPRESS**  
3

4 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES} ss.  
5

6 I am employed in the County of Los Angeles, State of California. I am over the  
7 age of 18 and not a party to the within action; my business address is: 1900 Avenue of  
the Stars, Suite 2700, Los Angeles, California 90067.

8 On August 31, 1999, I served the attached document described as:

9 **HOME DEPOT'S UNILATERAL PRE-TRIAL STATEMENT**

10 on all interested parties in this action by placing a true copy thereof enclosed in sealed  
11 envelopes *via federal express* addressed as follows:

12 H. Rey Stroube, III  
13 Akin, Gump, Strauss, Hauer & Feld, L.L.P.  
14 711 Louisiana, Suite 1900  
Houston, TX 77002  
15 Telephone: (713) 220-5858

16 Executed on August 31, 1999, at Los Angeles, California.

17 [ ] (STATE) I declare under penalty of perjury under the laws of the state of  
18 California that the above is true and correct.

19 [X] (FEDERAL) I declare that I am employed in the office of a member of the Bar  
20 of this Court at whose direction the service was made.

21   
22

23 

---

ANNE O. SALANO  
24  
25  
26  
27  
28

1  
2  
3  
4  
5  
6  
7  
8  
9  
0  
1  
2  
3  
4  
5  
6  
7  
8  
9  
0  
1  
2  
3  
4  
5  
6  
7  
8

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action; my business address is 1900 Avenue of the Stars, Suite 2700, Los Angeles, California 90067.

## HOME DEPOT'S UNILATERAL PRE-TRIAL STATEMENT

Randolph J. Haines, Esq.  
Lewis & Roca  
E-mail: [rjh@lrlaw.com](mailto:rjh@lrlaw.com)

H. Rey Stroube, III Esq.  
Akin, Gump, Strauss, Hauer & Feld LLP  
E-mail: [rstroube@akingump.com](mailto:rstroube@akingump.com)

{ } I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Anne G. Salt-

ANNE O. SALANO